

Olsten Health Services and its workers compensation insurance carrier, ITT Hartford (referred to jointly as "Olsten"), ask the Appeals Board of the Utah Labor Commission to review Administrative Law Judge La Jeunesse's decisions regarding A. Y.'s claim for benefits under the Utah Workers' Compensation Act ("the Act"; Title 34A, Chapter 2, Utah Code Ann.).

The Appeals Board exercises jurisdiction over this motion for review pursuant to Utah Code Ann. §63-46b-12 and Utah Code Ann. §34A-2-801(3).

BACKGROUND AND ISSUES PRESENTED

Mrs. Y. injured her cervical spine and right shoulder while working for Olsten on November 9, 1998. On January 19, 2000, she filed an application to compel Olsten to pay workers' compensation disability compensation and medical expenses for her injuries.

Judge La Jeunesse held an evidentiary hearing on Mrs. Y.'s claim on March 20, 2001, and then issued his first decision on February 25, 2002. In that decision, Judge La Jeunesse made a preliminary finding that Mrs. Y. was permanently and totally disabled as a result of her cervical spine injury, subject to Olsten's right to present a plan to rehabilitate and/or reemploy her. Judge La Jeunesse reserved judgment on Mrs. Y.'s shoulder injury pending medical panel review of that injury.

Olsten requested Appeals Board review of Judge La Jeunesse's preliminary decision. On January 31, 2003, the Appeals Board affirmed the decision in part, but remanded the matter to Judge La Jeunesse for further proceedings regarding: a) Mrs. Y.'s right shoulder injury; and b) other employment Mrs. Y. might be able to perform.

After the Appeals Board remanded Mrs. Y.'s claim, Judge La Jeunesse issued his second order on March 17, 2004. Based on evidence from the original hearing, plus a new medical panel evaluation of Mrs. Y.'s right shoulder injury, Judge La Jeunesse again concluded that Mrs. Y. was permanently and totally disabled, subject to Olsten's right to submit a rehabilitation/reemployment plan. Judge La Jeunesse allowed Olsten until March 27, 2004, to state whether it would submit such a plan.

On March 26, 2004, Olsten filed a motion for review of Judge La Jeunesse's second order. That same day, Olsten asked that the deadline for submitting a rehabilitation/reemployment plan be stayed until the Appeals Board ruled on Olsten's motion for review.

On March 30, 2004, Judge La Jeunesse issued his third order. He denied Olsten's request for a stay in submitting a rehabilitation/reemployment plan. Then, because the original deadline for submitting the plan was already passed, Judge La Jeunesse entered his final judgment that Mrs. Y. was permanently and totally disabled and awarded disability compensation and medical benefits accordingly.

On April 15, 2004, Olsten responded to Judge La Jeunesse's third order by filing a comprehensive motion for review that encompassed all Olsten's objections to Judge La Jeunesse's procedural and substantive rulings. In summary, Olsten argued that: 1) Judge La Jeunesse did not comply with the Appeals Board's order of remand; 2) Mrs. Y. failed to prove she is permanently and totally disabled; and 3) Olsten is entitled to a stay in submitting a rehabilitation/reemployment plan until the Appeals Board decides whether Mrs. Y. has established a *prima facie* case of permanent total disability.

Mrs. Y. has not responded to Olsten's motion for review.

FINDINGS OF FACT

The Appeals Board finds the following facts material to the issues raised in Olsten's motion for review. The Appeals Board also adopts Judge La Jeunesse's findings of fact to the extent they are consistent with these findings.

Mrs. Y. is now 65 years old and resides in St. George, Utah. She did not graduate from high school. Prior to 1990, she worked as an aerobics instructor and retail clerk. After 1990, she worked for Olsten as a home health aide. She has no other work experience or professional training that is relevant to her current ability to work.

While working for Olsten as a health aide, Mrs. Y. provided personal care, housekeeping services, transportation and companionship for Olsten's patients. These duties required strenuous activity and heavy lifting. On November 9, 1998, Mrs. Y. accidentally injured her neck and right shoulder as she lifted a patient out of bed and into his wheel chair. Specifically, Mrs. Y. suffered herniated discs at the C5 through C7 levels of her spine as well as right shoulder radiculopathy and scapular bursitis.

Ms. Y. underwent conservative therapy for several months after her accident. Despite this therapy, she experienced pain and muscle spasms. During August, 1999, she underwent discectomy, fusion and plating of the C4-C6 levels of the spine. This surgery was only partially successful in resolving her symptoms.¹ She continued to have significant pain and muscle spasm through the lower cervical area and extending into her upper right back. She was left with a permanent 15% whole person impairment as a result of her work-related cervical injuries and surgery.

On March 15, 2002, Mrs. Y. underwent right shoulder surgery for decompression, rotator cuff repair and bursitis resection. These conditions were not caused by Mrs. Y.'s work injury. The surgery lessened Mrs. Y.'s right shoulder problems, but she continued to have severe pain on the right side of her neck and right scapula. These continuing problems were caused by her work-related accident and limit any type of repetitive motion or lifting with her right arm.

Mrs. Y. attempted to return to light duty work for Olsten during the fall of 1999 as a filing clerk. Even though she only worked part time, the work aggravated her neck and back pain and forced her to quit. She has not been employed since. She also attempted to serve as a volunteer reading tutor at a local elementary school but could not tolerate the cervical movement necessary to look at the children and follow along in the reading materials.

Mrs. Y.'s functional capacity has declined over time. She is unable to perform any significant activity with her right arm. This precludes cleaning house, washing dishes and writing. She has very low dexterity in her hands and fingers. She finds it necessary to lie down several times a day due to her cervical and shoulder pain. In general, she is restricted to sedentary work that does not require any repetitive motion or lifting with her right arm. She is able to drive short distances, do light shopping and take care of her own grooming.

The Social Security Administration has concluded Mrs. Y. became totally disabled for purposes of social security disability compensation on November 1998, the date of her accident at Olsten.

Mrs. Y.'s physical impairments and limitations preclude her from returning to work as a home health aide. Although Olsten has identified other positions within its organization, such as "non-personal care worker," it believes Mrs. Y. could perform, the repetitive motion, lifting, and length-of-shift requirements are beyond Mrs. Y.'s capabilities. Olsten also contends Mrs. Y. could work in retail sales, where she has some prior experience. But again, the repetitive motion, lifting, and length-of-shift requirements are beyond Mrs. Y.'s capabilities. Finally, Olsten suggests that Mrs. Y. could find work in telemarketing in the St. George area. These positions are less physically demanding, but would require accommodation in terms of equipment, work hours and training. Furthermore, nothing in Mrs. Y.'s prior work history, aptitude or established skills is consistent with employment as a telemarketer.

DISCUSSION AND CONCLUSIONS OF LAW

There is no question that Mrs. Y. was accidentally injured while working for Olsten on November 8, 1998. What is in dispute is whether Mrs. Y. is entitled to permanent total disability compensation for her work injuries. This in turn depends on the causes and extent of Mrs. Y.'s injuries and whether she is capable of gainful employment. Judge La Jeunesse concluded Mrs. Y. cannot work and is entitled to a preliminary determination of permanent total disability. Olsten challenges Judge La Jeunesse's decision with several procedural and substantive arguments, addressed below.

Additional evidentiary proceedings. In its prior order, the Appeals Board returned Mrs. Y.'s claim to Judge La Jeunesse to: 1) investigate the nature and cause of Mrs. Y.'s right shoulder problems; and 2) determine the suitability of retail and telemarketer employment in the St. George area. Olsten contends Judge La Jeunesse failed to comply with the Appeals Board's instructions.

Regarding Mrs. Y.'s right shoulder problems, on remand Judge La Jeunesse appointed an impartial medical panel to evaluate the medical aspects of Mrs. Y.'s right shoulder injury. Judge La Jeunesse then adopted the panel's report. Judge La Jeunesse's actions are fully consistent with the Appeals Board instructions.

As to the suitability of retail and telemarketer positions, Judge La Jeunesse did not conduct additional proceedings. However, the Appeals Board has carefully reexamined the evidence of record and the above-referenced medical panel report and now concludes that no further evidentiary proceedings are required on this issue. As discussed in more detail below, the Appeals Board

concludes that Mrs. Y.'s condition precludes employment even in retail and telemarketing. Consequently, no additional proceedings are necessary on this point.

Preliminary finding of permanent total disability. To qualify for permanent total disability compensation, Mrs. Y. must satisfy the requirements of §34A-2-413(1)(b) and (c) of the Act.² Olsten contends Mrs. Y. has failed to satisfy one of those requirement, specifically, §34A-2-413(1)(c)(iv)'s requirement that she show she "cannot perform other work reasonably available, taking into consideration the employee's age, education, past work experience, medical capacity, and residual functional capacity."

In support of this argument, Olsten points out that Mrs. Y. did not submit expert testimony regarding her lack of employability. While such testimony might be helpful, it is not required if other relevant and persuasive evidence is submitted. In this case, Mrs. Y.'s own testimony that she cannot work is supported by medical evidence and, to some degree, by Olsten's own witnesses. The Appeals Board finds such evidence to be persuasive regarding Mrs. Y.'s inability to work.

Under §34A-2-413(1)(c)(iv), Mrs. Y.'s capacity for work must be judged in terms of her age, education, past work, medical capacity and residual functional capacity. After reviewing the evidence on these points, the Appeals Board concludes that Mrs. Y. cannot do the kind of work reasonably available to her. In particular, she is of relatively advanced age with minimal education and no specialized training in any relevant occupational field. During the last 15 years, she has worked in only one narrow occupation—as a home health aide. She has a permanent 15% impairment as a result of her cervical spine injury. She has additional right shoulder problems. She has debilitating pain brought on by almost any repetitive movement of her neck or right shoulder. She cannot do her former work, nor can she perform the kinds of work identified by Olsten.

As an additional argument, Olsten contends that even if Mrs. Y. cannot return to work as a home health aide, Olsten could nevertheless tailor a job to meet Mrs. Y.'s specific limitations. Olsten's efforts to accommodate Mrs. Y. are encouraged, but such efforts are properly evaluated as part of the rehabilitation/reemployment process authorized under §34A-2-413(6) of the Act. They are not pertinent to the question of whether Mrs. Y. has established a prima facie case of permanent total disability compensation.

Finally, Olsten challenges the medical panel's evaluation and opinion regarding Mrs. Y.'s right shoulder problems. First, Olsten argues that because Mrs. Y. did not mention her right shoulder problems in her initial application for hearing, Olsten lacked fair notice of that aspect of Mrs. Y.'s claim. However, the record is replete with references to Mrs. Y.'s right shoulder problems. The Appeals Board finds no basis to conclude that Olsten was surprised by the right shoulder claim. Furthermore, the Appeals Board is unwilling to impose technical pleading rules in workers' compensation cases which, by their very nature, are intended to be informal and to focus on substance over form.

As to the fundamental soundness of the medical panel's report, the Appeals Board notes that the panel was made up of independent medical experts. The panelists' comprehensive evaluation of Mrs. Y.'s right shoulder problems included consideration of her medical history, other medical opinions, diagnostic studies, surgery results and the panelists' own examination of Mrs. Y.. The Appeals Board finds the medical panel's report to be persuasive regarding the issues referred to the

panel. As to the medical panel's statement that Mrs. Y. "is permanently disabled from any type of employment," the Appeals Board understands that statement as an expression of the severity of Mrs. Y.'s physical limitations and not as a legal determination of permanent total disability.

In summary, the Appeals Board concludes that Mrs. Y. meets each of the criteria of §34A-2-413(1)(b) and (c) and, therefore, is entitled to a preliminary determination of permanent total disability, together with the payment of subsistence benefits that follows from such a determination.

Propriety of final order. Olsten contends Judge La Jeunesse erred in entering his final award of permanent total disability compensation before the Appeals Board had reviewed his preliminary determination. The Commission's rule R612-1-10.C.1(b) addresses this issue (emphasis added):

A party dissatisfied with the ALJ's preliminary determination may obtain additional agency review by either the Labor Commissioner or Appeals Board pursuant to Subsection 34A-2-801(3). If a timely motion for review of the ALJ's preliminary determination is filed with either the Labor Commissioner or Appeals Board, no further adjudicative or enforcement proceedings shall take place pending the decision of the Commissioner or Board.

In light of Olsten's timely request for Appeals Board review of Judge La Jeunesse's preliminary determination, rule R612-1-10.C.1(b) precluded any further action on Mrs. Y.'s claim until the Appeals Board had completed its review. Therefore, on its face, Judge La Jeunesse's final award of March 30, 2004, is inconsistent with the rule. However, Judge La Jeunesse has set forth two reasons why he believes rule R612-1-10.C.1(b) did not preclude entry of a final award in this case.

First, Judge La Jeunesse points to a companion rule, R612-1-10.C.1(d), which states that "an appeal of the Labor Commissioner or Appeals Board's preliminary determination . . . shall not delay the commencement of 'second step' proceedings" However, the Appeals Board notes that rule R612-1-10.C.1(d) applies only after a Commissioner or Appeals Board decision has been made. The rule does not apply to appeals from an ALJ's decision and, therefore, does not support entry of a final award under the circumstances of this case.

Second, Judge La Jeunesse views the Utah Supreme Court's recent decision in Thomas v. Color Country, 84 P. 3d 1201 (Utah 2004), as negating rule R612-1-10.C.1(b). Such a reading of Thomas is too broad. In Thomas, the Court considered whether an ALJ's preliminary award of subsistence payments could be judicially enforced by filing an abstract of judgment with the district court. The Thomas decision does not address the continuing validity rule R612-1-10.C.1(b), which merely regulates the Commission's internal adjudicative process in permanent total disability claims.

In light of the foregoing, the Appeals Board concludes that rule R612-1-10.C.1(b) remains valid and is applicable to this proceeding. The rule precluded Judge La Jeunesse from issuing a final award until the Appeals Board had completed its review of his preliminary determination. The Appeals Board therefore sets aside Judge La Jeunesse's final award as premature.

ORDER

The Appeals Board affirms Judge La Jeunesse's decision of March 17, 2004, finding Mrs. Y. entitled to a preliminary determination of permanent total disability and payment of subsistence benefits. The Appeals Board sets aside Judge La Jeunesse's final award of March 30, 2004 and remands this matter to Judge La Jeunesse for proceedings necessary to determine whether Mrs. Y. can be rehabilitated or reemployed.

Dated this 29th day of December, 2004.

Colleen S. Colton, Chair
Patricia S. Drawe
Joseph E. Hatch

1. The medical panel appointed by Judge La Jeunesse reports that, although Mrs. Y.'s problems were diagnosed as involving the C5-C7 levels, surgery was performed on the C4-C6 levels. The panel suggests that the C6-C7 level, which was not surgically repaired, may be responsible for Mrs. Y.'s ongoing radicular pain
2. Section §34A-2-413(1)(b) requires that Mrs. Y. prove: i) she is significantly impaired from her work accident; ii) she is permanently and totally disabled, as judged by the standards set forth in §34A-2-413(1)(c) of the statute; and iii) her work accident directly caused her permanent total disability. Section 34A-2-413(1)(c) in turn identifies four elements Mrs. Y. must show in order to demonstrate she is permanently and totally disabled: i) she is not employed; ii) her impairments limit her ability to do basic work; iii) her work-related impairments prevent her from performing the essential functions of her prior work; and iv) she can't perform other work reasonably available in light of her age, education, past work, medical capacity and residual functional capacity.